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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 34

UNITED STATES OF AMERICA, PETITIONER

vs.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED, AND SUNNYLAND FURNITURE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 10, 1954
CERTIORARI GRANTED MAY 24, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

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A [Caption omitted.]

2 [Caption omitted.]

In the United States District Court, Northern District of Texas

No. 4715 Civil

SUNNYLAND WHOLESALE FURNITURE COMPANY, PLAINTIFF

v.

THE LIVERPOOL & LONDON & GLOBE INSURANCE CO., LTD., DEFENDANT; UNITED STATES OF AMERICA, INTERVENOR

3 *Petition for removal*

To the Honorable William H. Atwell,
Judge of said Court:

Comes now the United States Attorney for the Northern District of Texas for and on behalf of the United States of America, complaining of The Liverpool & London & Globe Insurance Co., Ltd., and Sunnyland Wholesale Furniture Company, defendants, and would respectfully show the Court, as follows:

1

That on the second day of June, 1952, the United States Attorney for the Northern District of Texas was served with a copy of "Amended Answer of the Garnishee Liverpool & London & Globe Insurance Company, Ltd.," in the case of Sunnyland Wholesale Furniture Company, Plaintiff, vs. The Liverpool & London & Globe Insurance Co., Ltd., No. 64579–G, in the District Court of Dallas County, Texas, 134th Judicial District, which said amended answer had been theretofore filed on the 27th day of May, A. D., 1952, with the District Clerk, Dallas County, Texas, in said cause. Said amended answer is attached hereto and made a part hereof as Exhibit 1. Accompanying said amended answer was a Citation to the United States of America as a party defendant commanded to appear before the 134th Judicial
4 District Court in answer to said amended answer, which said Citation is attached hereto and made a part hereof as Exhibit 2.

2

This petition for removal is brought under the authority of Section 1444 and in accordance with the provisions of Section 1446, both of which Sections are in Title 28, U. S. Code, said action and cause in said State Court, as aforesaid, being an action

affecting property on which the said United States has lien, within the meaning of the provisions of Section 2410 of Title 28, U. S. Code.

3

Exhibits 1 and 2, attached hereto and made a part hereof constitute all process, pleadings, and orders served upon the said United States in the said action and cause in said State Court, as aforesaid.

Wherefore, the United States of America, your petitioner, prays that in accordance with the provisions of Section 1444, 1446, and 2410, Title 28, U. S. Code, the action and cause of Sunnyland Wholesale Furniture Company, Plaintiff, vs. The Liverpool & London & Globe Insurance Co., Ltd., No. 65579-G, be removed forthwith from the District Court of Dallas County, Texas 134th Judicial District, to the United States District Court for the Northern District of Texas, Dallas Division.

5 UNITED STATES OF AMERICA,
(S) Frank B. Potter,
FRANK B. POTTER,
United States Attorney.
(S) William Cantrell, Jr.,
WILLIAM CANTRELL, JR.,
Assistant United States Attorney.

[*Duly sworn to by William Cantrell, Jr.; jurat omitted in printing.*]

6 *Exhibit 1 to petition for removal*

AMENDED ANSWER OF THE GARNISHEE, LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, LTD.

Now comes the Garnishee, Liverpool & London & Globe Insurance Company, Ltd., and in response to the Writ of Garnishment served upon it herein on April 9, 1952, would answer as follows:

I

Answering that portion of the Writ of Garnishment which commands it to answer under oath what, if anything, it is indebted to D. Ray Adams, dba Adams Furniture and Hardware Company, the Defendant, and what it was so indebted, if anything, when the Writ of Garnishment was served upon it,
7 it answers under oath and says that at the time said Writ of Garnishment was served upon it and at this time it is not in-

debted to the said D. Ray Adams, dba Adams Furniture and Hardware Company and as Temple Gas Equipment Company in any sum or amount unless the facts hereafter set forth constitute such indebtedness.

II

Answering that portion of the Writ of Garnishment which commands it to answer under oath what effects, if any, of the said D. Ray Adams, dba Adams Furniture and Hardware Company and as Temple Gas Equipment Company it has in its possession and had when the Writ of Garnishment was served upon it, it would answer under oath as follows: That at the time the Writ of Garnishment was served upon it herein it did not have nor at this time does it have any effects of the said D. Ray Adams, dba Adams Furniture and Hardware Company and as Temple Gas Equipment Company in its possession, unless the facts hereinafter set out show otherwise.

III

Answering that portion of the Writ of Garnishment which commands it to answer under oath what other persons, if any, within its knowledge are indebted to the said D. Ray Adams, dba Adams Furniture and Hardware Company and as Temple Gas Equipment Company, the Garnishee would answer under oath that it knows of no other person who is indebted to the said D. Ray Adams dba Adams Furniture and Hardware Company and as Temple Gas Equipment Company, unless the facts hereinafter set out show otherwise.

IV

Answering further herein, the Garnishee would show that it has heretofore issued through its Temple, Texas Agency its policy of Fire Insurance No. 637257 to D. Ray Adams dba Adams Furniture and Hardware Company, which said policy insures against loss by fire to the stock, furniture and fixtures and improvements and betterments at 15 East Central Avenue, Temple, Texas, in the amount of $11,500.00. The Garnishee has been informed that the Hartford Fire Insurance Company has heretofore issued its policy of Fire Insurance No. 9584 to D. Ray Adams dba Adams Furniture and Hardware Company, which said policy insures against loss by fire to the stock, furniture and fixtures and improvements and betterments at 15 East Central Avenue, Temple, Texas, in the amount of $11,500.00.

V

The Garnishee has been informed and advised that fire occurred on March 8, 1952, injuring and damaging the stock above described.

9 It would show that the insurance policy issued by it to D. Ray Adams dba Adams Furniture and Hardware Company provides among other things that the insured shall within ninety-one (91) days after a fire make to it a written signed sworn proof of the loss setting out therein certain information as required by the terms of said policy, and that said policy further provides in substance among other things that nothing shall be due under the policy until sixty (60) days after such proof of loss shall be made, and also provides that no suit is sustainable on the policy until after compliance by the insured with these requirements. The Garnishee would show that the insured has not made to it the proof of loss called for by said policy, nor has any adjustment of the loss been had, nor has it had the opportunity up to this time to complete the investigation of the matter.

VI

The Garnishee would further show the Court that on April 7, 1952, it was served through its agent in Temple, Texas, with a levy issued by the Collector of Internal Revenue of the United States, said service occurring two days prior to service of the Writ of Garnishment herein. Said Levy, with Warrant for Distraint attached, notified the Garnishee that all property, rights to property, moneys, credits and/or bank deposits to the extent of $2,784.56 now in its possession and belonging or owing to D. Ray Adams, Adams Furniture & Hardware Company, Temple, Texas,

10 were thereby seized and levied upon for the payment of Internal Revenue Tax due from the latter. In this regard the Garnishee prays for the protection of the Court.

VII

The Garnishee would further show to the Court that it had received a copy of a Notice of Levy from the United States of America, First Collection District, State of Texas, addressed to Robinson, Cloud & Curl, Temple, Texas, Agents, Liverpool, London & Globe, 150 William Street, New York, New York, notifying that the United States claimed due and owing and unpaid from D. Ray Adams and Mary Martha Adams to the United States of America the sum of $10,469.96 as and for an Internal Revenue Tax. Same gave notice that all property, rights to property, moneys, credits and/or bank deposits now in your pos-

session and belonging to the aforesaid persons and all sums of money owing by you to the aforesaid persons are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is made upon you for the sum of $10,469.96 of the amount now owing from you to the said D. Ray Adams and Mary Martha Adams or for such lesser sum as you may be indebted to him, to be applied in payment of the said tax liability. The notice is dated at Temple, Texas, April 30, 1952, and is signed by Kirby H. Jackson, Acting Collector of Internal Revenue, by William A. Freeman, Deputy Collector. On the back thereof appears this certificate: "I certify that I
11 have, on this the 30th day of April 1952, personally delivered a copy of this levy to Mr. Maynard Robinson, Agent, Hartford Fire Insurance Co. and Robinson, London & Globe, Temple, Texas, dated 10:10 a. m. April 30, 1952, signed William A. Freeman, Deputy Collector."

Garnishee would further show that it does not know and has not been able to learn the attitude or position of the United States or said Deputy Collector of Internal Revenue relative to the applicability of Article 3466 of the Federal Revised Statutes, 31 U. S. C. A. Section 191, nor does it know the attitude of the United States or said Deputy Collector of Internal Revenue or of the Plaintiff in this garnishment, what their respective attitudes may be relative to the matter of priorities as between them.

It accordingly asks that citation issue against the United States of America for service upon the United States Attorney for the Northern District of Texas in the Federal Building at Fort Worth, Texas, and with a second copy of citation for service by Registered Mail upon the Attorney General of the United States at Washington, District of Columbia, and that citation issue for Mr. Kirby H. Jackson, Acting Collector of Internal Revenue, Austin, Texas, requiring them and each of them to answer and appear herein and set up any and all rights, claims for lien or other claims that they or either of them assert in connection with either of the levies above mentioned, and in connection with each of these levies. It says that it should at all times be protected
12 against double liability herein, particularly in that Plaintiff in Garnishment seeks to establish a garnishment lien in the amount of $2,329.27 besides interest and costs of suit, and the claim of the United States and of the Acting Collector of Internal Revenue above set out in connection with the two levies alleged exceeds the sum of $13,250.00, the aggregate of which is far in excess of any possible liability that this Garnishee might have to D. Ray Adams dba Adams Furniture & Hardware Company. In this regard, the Garnishee prays for the protection of the Court.

VIII

The Garnishee would show that it has been necessary for it to employ an attorney to answer herein, and asks a reasonable fee for so doing in the sum of $250.00.

Wherefore, Garnishee prays that on the final hearing hereof the Court enter such judgment as it may deem just and proper, protecting this Garnishee in all respects and allowing to it its costs and such reasonable compensation of $250.00.

THOMPSON & COE,
By (S) Will C. Thompson,
WILL C. THOMPSON,
Of Counsel, Attorneys for Garnishee,
The Liverpool & London & Globe
Insurance Company, Ltd.

13 1410 MERCANTILE SECURITIES BLDG.,
Dallas, Texas, Tel. RA-8621.

A copy of this Answer has on this the 27 day of May 1952 been mailed to James R. Alexander, Reserve Loan Life Building, Dallas, Texas, Attorney for Plaintiff.

(S) Will C. Thompson.
WILL C. THOMPSON.

[*Duly sworn to by Will C. Thompson; jurat omitted in printing.*]

14 *Exhibit 2 to petition for removal*

Form No. 353 Citation—10m

THE STATE OF TEXAS:

To The United States of America, with The United States Attorney for The Northern District of Texas in the Federal Bldg. at Forth Worth, Texas, as agent for service, You party defendant are hereby commanded to appear before the 134th Judicial District Court of Texas, at the Courthouse in the City of Dallas, Dallas County, Texas, at or before ten o'clock a. m., on the Monday next after the expiration of 20 days from the date of service hereof, then and there to answer to in writing to Second Amended Answer of the Liverpool & London Globe Ins. Co., Ltd.

Filed in said Court on the 27th day of May 1952 19____, against The United States of America, and the Attorney General of the United States at Washington, D. C., for suit, said suit being Numbered 64579-G, the nature of which demand is as follows:

as shown by said Garnishment, etc., amended answer, a copy of which accompanies this Citation.

If this Citation is not served within 90 days after date of its issuance, it shall be returned unserved.

Witness, Billshaw, Clerk of the District Courts of Dallas County, Texas.

Given under my hand and Seal of said Court at office in the City of Dallas, this the 27th day of May 1952.

15 Attest:

BILL SHAW,
Clerk of District Courts of
Dallas County, Texas.
By (S) Ruth Lander,
RUTH LANDER,
Deputy.

In United States District Court

Notice of removal

To The Liverpool & London & Globe Insurance Co., Ltd., and its attorneys, Thompson & Coe, Will C. Thompson of Counsel, 1410 Mercantile Securities Building, Dallas, Texas; and Sunnyland Wholesale Furniture Company and its attorney, James R. Alexander, Reserve Loan Life Building, Dallas, Texas:

You are hereby notified that, in accordance with Title 28, U. S. Code, Section 1446, the United States of America, defendant named in the Amended Answer of the Garnishee Liverpool & London & Globe Insurance Company, Ltd., in cause No. 64579–G, pending in the 134th Judicial District Court of Dallas County, Texas, wherein the Sunnyland Wholesale Furniture Company, a corporation, is plaintiff, and The Liverpool & London & Globe Insurance Company, Ltd., is defendant, has filed its Petition for Removal to the United States District Court for the Northern District of Texas, Dallas Division; such petition having
16 been filed on the 23d day of June A. D. 1952, and there is attached hereto a copy of the said Petition for Removal; you are further notified that such cause is now pending in the United States District Court for the Northern District of Texas, Dallas Division, and is numbered Civil Action No. 4715; said United States will likewise file a true and correct copy of the Petition on file in the United States District Court with the Dis-

trict Clerk of Dallas County, Texas, the Clerk of the 134th Judicial District Court of Texas.

(S) William Cantrell, Jr.
WILLIAM CANTRELL, JR.,
Assistant United States Attorney, Attorney of Record for the United States of America, Dallas 1, Texas.

17 In United States District Court

Motion to dismiss as to the United States as a party-defendant and to intervene as a party-plaintiff

To the Honorable William H. Atwell, Judge of said Court:

Comes now the United States Attorney for the Northern District of Texas for and on behalf of the United States of America in the above-entitled and numbered cause and would respectfully show the Court as follows:

That in the above entitled and numbered cause The Liverpool & London & Globe Insurance Co., Ltd., in the "Amended Answer of the Garnishee" prayed for citation to issue against the United States of America to answer and appear herein as a party-defendant; that the said United States has not consented to be sued in the above entitled and numbered cause as a party-defendant; that The Liverpool & London & Globe Insurance Co., Ltd., has in its possession moneys in which one D. Ray Adams et ux, Mary Martha Adams, have property and rights of property, and such moneys total $7,576.53; that the said D. Ray Adams et ux are taxpayers indebted to the United States of America in the total amount of $12,937.92, plus interest as provided by law; that the said United States has perfected recorded lien on all property and rights to property belonging to said taxpayers and has made levey on said moneys; and said lien of the said
18 United States is superior and prior to any other lien or claim, if any; that there is attached hereto a copy of a proposed pleading in intervention for and on behalf of the United States as a party-plaintiff.

Wherefore, Movant respectfully prays this Court to dismiss this cause as to the United States of America as a party-defendant and further prays that the United States of America be allowed to intervene in the above entitled and numbered cause as a party-plaintiff for the purpose of seeking foreclosure of its lien, and

for such other and further relief to which it may be entitled in law and in equity.

Frank B. Potter,
FRANK B. POTTER,
United States Attorney,
William Cantrell, Jr.,
WILLIAM CANTRELL, JR.,
Assistant United States Attorney,
Attorneys for Applicant.

In United States District Court

Order dismissing the United States as a party-defendant, etc.

July 21, 1952

Based on the foregoing Motion, it is by the Court

Ordered that the United States of America be and it is hereby dismissed as a party-defendant in the above entitled and
19 numbered cause and that the said United States be and it is hereby granted leave to intervene as a party-plaintiff herein.

Done at Dallas, Texas, this the 21 day of July A. D. 1952.

WM. H. ATWELL,
United States District Judge.

[Certificate of service omitted in printing.]

In United States District Court

Petition in intervention

To the Honorable William H. Atwell, Judge of said Court:

Comes now the United States of America, with leave of the Court first had, intervenor in the above-entitled and numbered cause, by and through the United States Attorney for the Northern District of Texas, who is in this duly authorized by the Commissioner of Internal Revenue of the said United States and directed by the Attorney General of the said United States
20 and files this its petition in intervention and hereby complains of Sunnyland Wholesale Furniture Company, a corporation, with an office, agent and representative at 2309 Alamo Street, Dallas, Dallas County, Texas, and of The Liverpool & London & Globe Insurance Co., Ltd., a corporation, having attorneys of record, Thompson & Coe, 1410 Mercantile Securities Building, Dallas, Dallas County, Texas, and of D. Ray Adams,

whose address in Temple, Bell County, Texas, doing business as Adams Hardware and Furniture Company and as Temple Gas Equipment Company, and of his wife, Mary Martha Adams, whose address is Temple, Texas, and would respectfully show the Court, as follows:

1

Said D. Ray Adams and his said wife, Mary Martha Adams, are taxpayers indebted to the United States of America for the taxes set forth in detail in Schedule "A", attached hereto and made a part hereof as Exhibit 1, and said taxes total the sum of $12,937.92, plus interest as provided by law.

2

Notice of lien for an on behalf of the said United States was filed in the amount of $2,520.05, on March 24, 1952, with the County Clerk of Bell County, Belton, Texas. A copy of such notice is attached hereto and made a part hereof as Exhibit 2.

Another tax lien for and on behalf of said United States,
21 in the amount of $10,417.87, was filed, on April 26, 1952, with the County Clerk of said Bell County. A copy of such latter notice is attached hereto and made a part hereof as Exhibit 3.

3

Said taxes, as aforesaid, as to type, tax period, amount outstanding, list and account numbers, dates assessment lists were signed by Commissioner, dates assessment lists were received by the Collector of Internal Revenue for the First Collection District of Texas, dates of notices and demands issued, dates distraint warrants were issued, and dates of notices of lien filed are fully set forth in Exhibit 1, attached hereto and made a part hereof as fully and as completely as if set forth in this paragraph in detail as to each item of tax due and owing by said taxpayer.

4

On March 8, 1952, the said taxpayers suffered a loss of property by fire. Such loss was covered by fire insurance policies in force with The Liverpool & London & Globe Insurance Co., Ltd., a party hereto, and the Hartford Fire Insurance Company. Adjusters for said insurance companies determined the extent of the loss to be in the sum of $15,153.06, and an agreement was entered into between the said taxpayers and the said insurance companies

to settle the claims for fire loss of the taxpayers for the sum last mentioned, each said insurance company agreeing to
22 share one-half of the said loss, thereby creating a right to property in the said taxpayers in the moneys in the hands of the said Liverpool & London & Globe Insurance Co., Ltd., in the total amount of $7,376.53.

5

On the 8th day of April 1952 the said Sunnyland Wholesale Furniture Company filed the above-entitled and numbered cause in the 134th Judicial District Court of Dallas County, Texas, seeking to obtain judgment in the sum of $2,329.27, whereupon the court immediately issued a writ of garnishment which was also served on appropriate agents for the said insurance company, attaching the taxpayers' money held by them.

6

The Acting Collector of Internal Revenue for the First Collection District of Texas caused to be served upon the said insurance companies, by delivering in person to their agents in Temple, Bell County, Texas, copies of the notice of tax lien, warrants for distraint and levy, in the amount of $2,784.56, said notice, warrants and levy having been served, as aforesaid, on April 7, 1952. Thereafter, the said Acting Collector of Internal Revenue for the First Collection District served at Temple, Bell County, Texas, on April 30, 1952, a copy of notice to tax lien, warrant for distraint, and levy, in the amount of $10,469.96, on appropriate agents for the said insurance company.

23 8

Pursuant to the facts hereinabove alleged and Sec. 3670, *et seq.*, of T. 26, U. S. C., the United States of America has a first and prior lien on any and all property and rights to property belonging to the said taxpayers.

Wherefore, premises considered, the intervenor, the United States of America, prays this Honorable Court that upon a hearing hereof, the liens of the said United States for taxes, penalty and interest assessed, and for penalties and interest accruing thereon in accordance with law be declared and established on property and rights to property belonging to the said D. Ray Adams et ux, Mary Martha Adams, involved in this action; that such liens be enforced by foreclosure; that all property and rights to property belonging to the said D. Ray Adams et ux, Mary Martha Adams, involved in this a it be disposed of according to the

laws of the United States; and for such other and further relief to which the said United States may be entitled.

UNITED STATES OF AMERICA,
(S) Frank B. Potter,
FRANK B. POTTER,
United States Attorney.

24 (S) William Cantrell, Jr.,
WILLIAM CANTRELL, JR.,
Assistant United States Attorney,
Attorneys for Intervenor.

[*Duly sworn to by William Cantrell, Jr., jurat omitted in printing.*]

25

Exhibit 1 to petition in intervention

Name of taxpayer: D. Ray and Mary Martha Adams, D. Ray Adams, d/b/a Adams Furniture & Hardware Co., Temple, Texas.
Collection District: First District of Texas, Austin, Texas.

Schedule of tax data designated Schedule "A"

[D. Ray Adams and Mary Martha Adams]

Type of Tax	Tax Period	Amount Outstanding	List & Account No.	Date Assm't. List Signed By Commr. (F. 23-C)	Date List Rec'd. By Collr.	Notice & Demand Issued (F. 17)	Distraint Warrant Issued (F. 69)	Notice of Lien Filed (F. 668)*
Income	1948	$1,889.84	April 1952 Spl #10-00	4-18-52	4-21-52	4-21-52	4-30-52	4-26-52
Income	1949	7,404.78	April 1952 Spl #10-02	4-18-52	4-21-52	4-21-52	4-30-52	4-26-52
Income	1950	1,123.25	April 1952 Spl #10-04	4-18-52	4-21 52	4-21-52	4-30-52	4-26-52
Total		[1] $10,417.57						

*Notice of Federal Tax Lien was filed with the County Clerk, Bell County, Belton, Texas, on the date indicated above.
[1] Plus interest as provided by law.

26

Schedule of tax data designated Schedule "A"—Continued

[D. Ray Adams, d/b/a Adams Furniture & Hardware Company]

Type of Tax	Tax Period	Amount Outstanding	List & Account No.	Date Assm't. List Signed By Commr. (F. 23-C)	Date List Rec'd. By Collr.	Notice & Demand Issued (F. 17)	Distraint Warrant Issued (F. 69)	Notice of Lien Filed (F. 668)*
Withholding	Qtr. Ended 9-30-51	$1,511.56	Nov. 1951 #663-2		12-26-51	12-17-51		3-25-52
Withholding	Qtr. Ended 12-31-51	1,006.50	Feb. 1952 #554-6		2-26-52	2-27-52		3-25-52
Total		[1] 2,518.06						

*Notice of Federal Tax Lien was filed with the County Clerk, Bell County, Belton, Texas, on the date indicated above.
[1] Plus interest as provided by law.

27 Name of taxpayer: D. Ray and Mary Martha Adams, D. Ray Adams, d/b/a Adams Furniture & Hardware Co., Temple, Texas.
Collection District: First District of Texas, Austin, Texas.

Schedule of tax data designated Schedule "A"

[D. Ray Adams and Mary Martha Adams]

Type of Tax	Tax Period	Amount Outstanding	List & Account No.	Date Assmt. List Signed By Commr. (F. 23-C)	Date List Recd. By Collr.	Notice & Demand Issued (F. 17)	Distraint Warrant Issued (F. 69)	Notice of Lien Filed (F. 668)*
Income	1948	$1,889.84	April 1952 Spl #10-00	4-18-52	4-21-52	4-21-52	4-30-52	4-26-52
Income	1949	7,404.78	April 1952 Spl #10-02	4-18-52	4-21-52	4-21-52	4-30-52	4-26-52
Income	1950	1,123.25	April 1952 Spl #10-04	4-18-52	4-21-52	4-21-52	4-30-52	4-26-52
Total		[1] 10,417.57						

*Notice of Federal Tax Lien was filed with the County Clerk, Bell County, Belton, Texas, on the date indicated above.
[1] Plus interest as provided by law.

28 *Schedule of tax data designated Schedule "A"*—Continued

[D. Ray Adams d/b/a Adams Furniture & Hardware Company]

Type of Tax	Tax Period	Amount Outstanding	List & Account No.	Date Assmt. List Signed By Commr. (F. 23-C)	Date List Recd. By Collr.	Notice & Demand Issued (F. 17)	Distraint Warrant Issued (F. 69)	Notice of Lien Filed (F. 668)*
Withholding	Qtr. Ended 9-30-51	$1,511.56	Nov. 1951 #663-2		12-26-51	12-17-51		3-25-52
Withholding	Qtr. Ended 12-31-51	1,006.50	Feb. 1952 #554-6		2-26-52	2-27-52		3-25-52
Total		[1] 2,518.06						

*Notice of Federal Tax Lien was filed with the County Clerk, Bell County, Belton, Texas, on the date indicated above.
[1] Plus interest as provided by law.

29 In United States District Court

Acknowledgment and consent

August 7, 1952

The plaintiff, Sunnyland Wholesale Furniture Company, and the Intervenor, the United States of America, each acknowledge a copy of the Third Amended Answer of The Liverpool & London & Globe Insurance Company, Ltd.

Each consents that said Third Amended Answer of The Liverpool & London & Globe Insurance Company, Ltd., may be filed by The Liverpool & London & Globe Insurance Company, Ltd., so as to be and become a part of the pleadings in this cause.

Dated at Dallas, Texas, this 7 day of August 1952.

SUNNYLAND WHOLESALE FURNITURE COMPANY,
By JAMES R. ALEXANDER,
Atty. for Plaintiff.

UNITED STATES OF AMERICA,
By WILLIAM CANTRELL, Jr.,
Asst. U. S. Atty., Intervenor,
N. D. of Texas.

30 In United States District Court

Third amended answer of the Liverpool & London & Globe Insurance Company, Ltd.

Now comes the Liverpool & London & Globe Insurance Company, Ltd., and in response to the Writ of Garnishment served upon it on April 9, 1952, and in response to the Petition in Intervention filed herein by the United States of America, and in answer to any other pleading which may be filed herein, would answer as follows:

I

Answering that portion of the Writ of Garnishment which commands it to answer under oath what, if anything, it is indebted to D. Ray Adams doing business as Adams Furniture & Hardware Company, and what it was so indebted, if anything, when the Writ of Garnishment was served upon it, it answers under oath and says that at the time said Writ of Garnishment was served upon it and at this time it is not indebted to the said D. Ray Adams doing business as Adams Furniture & Hardware Company and as Temple Gas Equipment Company in any sum or amount except as hereafter set forth.

II

Answering that portion of the Writ of Garnishment which commands it to answer under oath what effects, if any, of the
21 said D. Ray Adams doing business as Adams Furniture & Hardware Company and as Temple Gas Equipment Company it has in its possession and had when the Writ of Garnishment was served upon it, it would answer under oath as follows: That at the time the Writ of Garnishment was served upon it herein, it did not have nor at this time does it have any effects of the said D. Ray Adams doing business as Adams Furniture & Hardware Company and as Temple Gas Equipment Company in its possession, except as hereafter alleged.

III

Answering that portion of the Writ of Garnishment which commands it to answer under oath what other persons, if any, within its knowledge are indebted to the said D. Ray Adams doing business as Adams Furniture & Hardware Company and as Temple Gas Equipment Company, it would answer under oath that it knows of no other person who is indebted to the said D. Ray Adams doing business as Adams Furniture & Hardware Company and as Temple Gas Equipment Company, except the Hartford Fire Insurance Company, as shown by the facts hereafter set out.

ANSWER TO THE INTERVENTION OF THE UNITED STATES OF AMERICA

IV

Answering Paragraph 1 of said Petition in Intervention,
32 it alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments set out in said Paragraph. Accordingly, it pleads said fact as a denial.

V

Answering Paragraph 2 of said Petition in Intervention, it admits the facts therein set forth.

VI

Answering Paragraph 3 of said Petition in Intervention, it alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments set out in said paragraph, and accordingly pleads said fact as a denial.

VI

Answering Paragraph 4 of said Petition in Intervention it says that on March 8, 1952, a fire occurred which injured and damaged the following described property, as described in Policy No. 637257 of the Liverpool & London & Globe Insurance Company, Ltd., issued to D. Ray Adams, doing business as Adams Furniture & Hardware Company, said policy insuring against loss by fire to the stock, furniture and fixtures and improvements and betterments at East Central Avenue, Temple, Texas, said property likewise being described in a fire insurance policy issued by the Hartford Fire Insurance Company to the same
33 insured covering at the same location. The limit of liability under each of said policies was $11,500.00. The Hartford Policy was No. 9584. Under the terms and provisions of said two insurance policies each company would be liable for one-half the loss. On or about July 24th, 1952, the said D. Ray Adams made to the Liverpool & London & Globe Insurance Company, Ltd. a proof of loss in the amount of $7,576.53 as its pro rata liability for the entire loss sustained, namely, one-half thereof. Under the terms of said fire insurance policy the amount owing is due sixty days following the receipt of such proof of loss. The premium on the policy of said Liverpool & London & Globe Insurance Company, Ltd., has never been paid by the said D. Ray Adams, and is the sum of $155.98. Except as herein admitted the allegations of said Paragraph are denied.

VIII

Answering Paragraph 5 of said Petition in Intervention, it would show that in Cause No. 64586-G, in the 134th District Court of Dallas County, Texas, the Sunnyland Wholesale Furniture Company sought to recover $2,329.27 besides interest and costs of suit, Writ of Garnishment thereon being issued April 8, 1952, and being served April 9, 1952. Except as herein admitted, the allegations of said paragraph are denied.

IX

Answering Paragraph 6 of said Petition in Intervention,
34 it says that on April 7, 1952, at 2:20 p. m., W. A. Freeman, Deputy Collector, delivered to Mr. Mainard Robinson, Local Agent for the Liverpool & London & Globe Insurance Company, Ltd., at Temple, Texas, Mr. Robinson's address being 12 West Adams Street, Temple, Texas, a levy on behalf of the United

States of America which notified Liverpool & London & Globe Insurance Company, Ltd., 150 William Street, New York, New York, that there is due, owing and unpaid from D. Ray Adams, Adams Furniture & Hardware Company, Temple, Texas, to the United States of America, the sum of $2,784.56 as and for an internal revenue tax. And on April 30, 1952, William A. Freeman, Deputy Collector, personally delivered to Mr. Mainard Robinson, who is described in the certificate of said William A. Freeman endorsed thereon as "Agent, Hartford Fire Insurance Co. and Robinson, London & Globe, Temple, Texas." This occurred at 10:10 a. m. on said date. The notice of levy of the United States is addressed to the Liverpool, London & Globe, 150 William Street, New York, New York, and gives notice that there is now due, owing and unpaid from D. Ray Adams and Mary Martha Adams to the United States of America the sum of $10,469.96 as and for an internal revenue tax. Since the date of said levy and said notice of levy, and each of them, the Liverpool & London & Globe Insurance Company, Ltd., has made no payment either to D. Ray Adams or to Mary Martha Adams. Except as herein admitted, the allegations of said Paragraph 6 are denied.

35

X

Answering Paragraph 8 of said Petition of Intervention, it is without knowledge or information sufficient to form a belief as to the truth of the averments therein set out, and it accordingly states such fact as a denial.

COMPLAINT AS TO D. RAY ADAMS AND HIS WIFE, MARY MARTHA ADAMS

XI

The Liverpool & London & Globe Insurance Company, Ltd. alleges that it is a citizen of England with its principal office in London, England, and that D. Ray Adams and his wife, Mary Martha Adams, are citizens of Texas, residing at Longview, Gregg County, Texas.

XII

It says that neither the said D. Ray Adams nor the said Mary Martha Adams has given to it any advice or information or statement relative to the claim for debt asserted by the Plaintiff Sunnyland Wholesale Furniture Company nor as to the income taxes claimed by the United States of America in its petition for intervention filed herein. Accordingly, it says that summons

should issue for the said D. Ray Adams and the said Mary Martha Adams requiring them and each of them to appear
36 and answer herein and interplead with the said Sunnyland Wholesale Furniture Company and with the said United States of America as to the sum of money hereafter tendered into the registry of this Court by it. It prays for that relief.

INTERPLEADER ACTION

XIII

The Liverpool & London & Globe Insurance Company, Ltd., a citizen of England with its principal office in London, England, is confronted with claims by the Sunnyland Wholesale Furniture Company, a Texas Corporation with its principal office in Dallas, Texas, seeking to enforce a garnishment lien in the sum of $2,329.27 besides interest and costs of suit, and is further confronted by levies and notices of levy and tax liens alleged and claimed by the United States of America in a sum in excess of $13,000.00 as is shown by the Petition of Intervention of the United States of America herein filed. It has issued to D. Ray Adams, a Texas citizen, a resident of Lonview, Gregg County, Texas, its policy of fire insurance under which as heretofore alleged there is a liability of $7,500.39, which will be due and owing by it on or about September 24, 1952. Presumptively, the property described in its said fire insurance policy is community property in which Mary Martha Adams, a citizen of Texas, the wife of D. Ray Adams, and a resident of Longview, Gregg County, Texas, has a community interest. It is without advice from the said D. Ray Adams or the said Mary Martha Adams as
37 to the claim of them or either of them as to the garnishment lien asserted by the Sunnyland Wholesale Furniture Company or as to the tax liens claimed by the United States of America.

XIV

The amount in controversy herein, the sum of $7,500.39 as alleged above, is desired to be tendered and is herewith tendered subject to the Order of the Court directing the Clerk to receive and accept such tender, its Loss Draft in the sum of $7,500.39, the amount above set out, which is the amount owing by it under its said policy of fire insurance on account of the loss by fire occurring at Temple, Texas, as above alleged.

It says that it should be discharged from further liability herein, as a result of such tender, and that the Sunnyland Wholesale Furniture Company, the United States of America, D. Ray Adams, and his wife, Mary Martha Adams, should be required to

interplead herein and set up the rights of them and each of them in and to the moneys tendered by it into the registry of the Court as aforesaid, which sum is less than the combined claims of the Sunnyland Wholesale Furniture Company and the United States of America.

XV

It says that it has been necessary for it to employ an attorney herein to answer the garnishment proceedings brought
38 against it by the Sunnyland Wholesale Furniture Company, and to answer the Petition in Intervention brought against it by the United States of America, and to file this interpleader proceeding for its protection. It says that it should be allowed a reasonable attorney's fee for such services, and such action required on its part, and its says that the sum of $500.00 is a reasonable attorney's fee in connection therewith.

The Liverpool & London & Globe Insurance Company, Ltd., prays this Honorable Court that there be rendered and entered an Order directing the Clerk of this Court to receive its loss draft in the amount of $7,500.39 as above set out, same being its tender into the registry of this Court of the amount owing by it under its said policy on account of the loss by fire above set out, and that the Clerk of this Court be directed to collect said draft and place the proceeds thereof in the registry of this Court subject to the further order of this Court; it further prays that summons be issued to the said D. Ray Adams and his wife, Mary Martha Adams, residents of Longview, Gregg County, Texas, requiring them and each of them to appear and answer herein and set up any and all rights in and to the proceeds of said policy above mentioned, and that the said D. Ray Adams and his wife, Mary Martha Adams, and the United States of America and the Sunnyland Wholesale Furniture Company be required to interplead setting up their rights and the rights of each of them in and to the tender made into the registry of this Court by it. It further prays for a discharge from any other or further liability herein including
39 its costs, and prays that it be allowed a reasonable attorney's fee in the amount and sum above set forth, and it further prays for such other and further relief to which it, The Liverpool & London & Globe Insurance Company may be entitled.

THE LIVERPOOL & LONDON &
GLOBE INSURANCE COMPANY, LTD.,
By (S) WILL C. THOMPSON,
Attorney, 1410 Mercantile Securities Building,
Dallas 1, Texas, Tel. RA-8621.

[*Duly sworn to by Will C. Thompson; jurat omitted in printing.*]

40 In United States District Court

Motion of the Liverpool & London & Globe Insurance Company, Ltd., relative to acceptance of tender

Now comes The Liverpool & London & Globe Insurance Company Ltd., a Defendant in the above-entitled and numbered cause, and would show to the Court that pursuant to its Third Amended Answer filed herein, it desires to tender into the registry of the Court the sum of $7,500.39. This amount is arrived at as follows:

This Defendant's pro rata liability for a loss by fire occurring at Temple, Texas, was $7,576.53. The premium upon the insurance policy on which that amount arose was $155.98. The policy was cancelled as of the date of the fire which was March 8, 1952, which would have resulted in a return premium of $79.84. The amount of the tender is therefore the sum of $7,576.53 plus $79.84, or a total of $7,656.37, less the premium of $155.98 which was never paid by the insured named in the policy, D. Ray Adams. The result is the aforesaid $7,500.39. The various parties to this suit have been advised as to the amount of this proposed tender, and have not objected thereto.

This Defendant asks this Court for its Order directing the Clerk of the United States District Court for the Northern District of Texas to accept the accompanying loss draft of itself, said draft being numbered 350248, and payable to said Clerk in the
41 amount of $7,500.39, and the said Clerk be ordered and directed to collect said loss draft and place the proceeds thereof within the registry of this Court subject to the further order of this Court.

This Defendant prays for such on Order, and further prays for general relief in connection therewith.

THOMPSON & COE,
By WILL C. THOMPSON,
Attorney for Defendant, The Liverpool & London & Globe Insurance Company, Ltd., 1410 Mercantile Securities Bldg., Dallas, Texas, Tel. RA-3621.

In United States District Court

Order on motion in connection with tender

September 1, 1952

On this day came on to be heard the Motion of the Liverpool & London & Globe Insurance Company, Ltd., a Defendant in the above cause, for an Order authorizing and directing the Clerk of this Court to receive its Loss Draft No. 350248, payable to the

order of said Clerk, in the amount of $7,500.39, said draft being made as a tender into the registry of this Court, and for an Order authorizing and directing the Clerk of this Court to collect said draft and place the proceeds thereof within the registry of this Court subject to the further Order of this Court.

42 It appearing to the Court that said Motion should be granted.

It is therefore ordered, adjudged and decreed that the Clerk of this Court shall receive from the Defendant, The Liverpool & London & Globe Insurance Company, Ltd., its Loss Draft No. 350248, payable to the Clerk of this Court in the amount of $7,500.39, and it is further ordered, adjudged and decreed that the Clerk of this Court shall collect said draft and place the proceeds thereof in the registry of this Court subject to the further order of this Court.

Dated at Dallas, Texas, this 1 day of September 1952.

WM. H. ATWELL,
U. S. Dist. Judge.

In United States District Court

Original answer of D. Ray Adams and wife Mary Martha Adams

To the Honorable William H. Atwell, Judge of said Court:

Now come D. Ray Adams and wife Mary Martha Adams (hereinafter styled "defendants") and file this, their original answer to the cross-complaint of The Liverpool & London & Globe Insurance Company, Ltd., (hereinafter styled "garnishee"), filed

43 against these defendants herein, and for such answer show the Court as follows:

1

Generally answering to the Third Amended Original Answer and interpleader action of the said garnishee, these defendants show the Court that they did have policies of insurance with garnishee and with Hartford Fire Insurance Company as alleged in paragraph VII of the garnishee's said pleading; that the limits of liability of those companies were as alleged in such paragraph; that these defendants did suffer a loss by fire which was compensable under the terms of such policies as alleged in such paragraph; and that the entire amount due and owing by such garnishee to these defendants, after the various adjustments set forth in garnishee's pleadings (all of which are true and correct) is $7,500.39, as set forth in paragraph XIII of garnishee's said pleading. These defendants attach hereto as Exhibit "A" to this

pleading, and make a part hereof for all purposes, the garnishee's insurance policy referred to in garnishee's pleadings. Upon payment of the amount of $7,500.39 into Court by such garnishee, such garnishee will have discharged its duties and obligations under said policy fully, so far as these defendants know and believe. Garnishee owes no other amounts to these defendants.

2

These defendants further show that the claims of the
44 United States to the proceeds of such policy under its tax liens, and said liens themselves, are valid, true and correct, so far as these defendants know and believe; and that the claims of the United States of America constitute valid and subsisting and first liens upon the funds tendered into Court by garnishee, superior to the claims of Sunnyland Wholesale Furniture Company, against the same, so far as these defendants know and believe.

3

Answering specially to the paragraphs of the interpleader cross-complaint of garnishee against them, these defendants admit that garnishee issued its policy of insurance to defendants, as aforesaid, and that the liability of garnishee thereon is as set forth above; in the amount of $7,500.39. These defendants further admit that the proceeds of such policy are community property of defendants D. Ray Adams and wife Mary Martha Adams. These defendants admit that the levies, notices of levy and tax liens alleged and claimed by the United States of America herein are true and correct and constitute valid and just claims, and are superior, so far as these defendants know and believe, to the claims and demands of Sunnyland Wholesale Furniture Company.

4

Answering specially to paragraph XIV of said interpleader cross-action of garnishee, these defandants say that upon
45 receipt of the amount of $7,500.39 from garnishee by the Court, garnishee should be discharged from further liability as prayed for; that thereupon said money should be applied first to payment of the claims of the United States of America; that should any money have remained after payment of such claims of the government, said money should next have been applied to payment of the claim of Sunnyland Wholesale Furniture Company and any balance remaining to these defendants, but that such sum of money is insufficient to pay the claims of the United

States of America, and therefore such Furniture Company and these defendants, having claims therein inferior to those of the government, are entitled to nothing therefrom.

Wherefore, these defendants pray that such funds be applied to the claims and liens of the United States of America; for costs of court, and for general relief.

(S) D. RAY ADAMS,
D. R. ADAMS,
Defendant.

[*Duly sworn to by D. Ray Adams; jurat omitted in printing.*]

46 In United States District Court

Answer to the intervention of the United States of America

I

Answering Paragraph I of said petition and intervention, Sunnyland Wholesale Furniture Company alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments set out in said paragraph. Accordingly, it pleads said facts as a denial.

II

Answering Paragraph II of said petition and intervention, it admits the facts therein set forth.

III

47 Answering Paragraph III of said petition and intervention, it alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments set out in said paragraph. Accordingly, it pleads said fact as a denial.

IV

Answering Paragraph IV of said petition and intervention, it admits the facts therein set forth.

V

Answering Paragraph V of said petition and intervention, it admits the facts therein set forth, except that interest and costs were also sought to be recovered.

VI

Answering Paragraph VI of said petition and intervention, it alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments set out in said paragraph. Accordingly, it pleads said fact as a denial.

VII

Answering Paragraph VIII of said petition of intervention, plaintiff herein denies that pursuant to the facts alleged in
48 the petition of intervention that the United States of America has a first and prior lien on any and all property and property rights belonging to said taxpayers but would state that by reason of the facts set forth that the lien obtained by the plaintiff herein prior and superior to the notice of tax lien filed by the intervenor on April 26, 1952, and that the plaintiff herein has a first and prior lien by virtue of the execution of the writ of garnishment on April 9, 1952, to the extent of the amount of money claimed therein to wit: $2,516.07 and that in accordance with Section 3672 U. S. C., the lien of the government is inferior, it having not been recorded until subsequent to the establishment of the plaintiff's lien herein.

Wherefore, premises considered, the plaintiff, Sunnyland Wholesale Furniture Company prays this Honorable Court that upon a hearing hereof it shall have judgment for the said sum of $2,516.07 now on deposit with the Clerk of the Court together with interest and its costs expended.

FRITZ, GOLDBERG AND ALEXANDER,
Attorneys for Plaintiff.
By (S) James R. Alexander,
JAMES R. ALEXANDER,
505 North Erray, RA-9211.

[Proof of service omitted in printing.]

49 [*Duly sworn to by James R. Alexander; jurat omitted in printing.*]

50 In United States District Court

Final Judgment

October 7, 1952

On this the 7th day of October 1952, came on to be heard the above styled and numbered cause and came the parties by their respective counsel and submitted the matters in controversy to

the Court and the Court having heard the pleadings, evidence, and argument of counsel is of the opinion and finds that the law and the facts are with the plaintiff and that the plaintiff herein has a fixed and prior lien by virtue of the execution of its writ of garnishment on April 9, 1952, to the extent of the amount of money claimed and that the plaintiff ought to have judgment for the sum of $2,516.07 plus $44.03 interest and $18.45 costs making a total of $2,578.55 out of the funds on deposit with the Clerk of this Court.

And it further appearing to the Court that the Liverpool & London & Globe Insurance Company, Ltd., has heretofore delivered to the District Clerk for the U. S. District Court for the Northern District of Texas, Dallas, Texas, its loss draft in the sum of $7,500.39.

And it further appearing that pursuant to the stipulation made by all of the parties to this suit and the garnishment in connection therewith and by the intervenor, the United States of America, the sum thus tendered by the Liverpool & London & Globe Insurance Company, Ltd., above mentioned constitutes the limits of its liability under its policy of fire insurance on account of the fire complained of.

51 And it further appearing that no contest exists or is to exist in this cause as between the Liverpool & London & Globe Insurance Company, Ltd., and any other parties to this cause.

And it appearing to the Court that the Liverpool & London & Globe Insurance Company, Ltd., should be discharged with its costs and an allowance of a reasonable attorney fee in connection with the garnishment, answer and intervention proceedings had in this cause.

And it further appearing to the Court that a reasonable fee in this cause in connection with the garnishment and interpleader proceedings is the sum of $500.00 and accordingly

It is therefore ordered, adjudged and decreed by the Court that the plaintiff, Sunnyland Wholesale Furniture Company, a corporation do have and recover judgment in the amount of $2,578.55 with interest from the date of this judgment together with all costs incurred herein and,

It is further ordered that the Clerk of this Court be ordered and is ordered and directed to issue his check against the funds in the registry of the Court tendered by the Liverpool & London & Globe Insurance Company, Ltd., in the above amount, and

It is further ordered, adjudged and decreed by the Court
52 that the Liverpool & London & Globe Insurance Company, Ltd., be and it hereby is discharged from any other or further liability to the plaintiff, Sunnyland Wholesale Furniture

Company, to the defendants D. Ray Adams and wife, Mary Martha Adams, dba Adams Furniture & Hardware Company and dba Temple Gas Equipment Company, and to the intervenor, the United States of America, in connection with the matters involved in this cause, said insurance company defendant having discharged in full its liability under its policy of insurance involved in this cause, and on account of the loss by fire complained of in this suit.

It is further ordered, adjudged and decreed by the Court that no costs herein be taxed against the Liverpool & London & Globe Insurance Company, Ltd.

It is further ordered, adjudged and decreed by the Court that the Liverpool & London & Globe Insurance, Ltd., be and is hereby allowed a reasonable attorney's fee in connection with the garnishment and interpleader proceedings, and the tender made in connection therewith in this cause, the amount thereof being fixed at the sum of $500.00.

The Clerk of this Court is ordered and directed to issue his check against the funds in the registry of the Court tendered by the Liverpool & London & Globe Insurance Company, Ltd., in this cause, said check to be in the sum and amount of $500.00 and payable to Thompson & Coe, Attorneys,
53 1410 Mercantile Securities Bldg., Dallas, Texas, attorneys for the Liverpool & London & Globe Insurance Company, Ltd., and the Clerk is directed to mail said check to said attorneys.

And it is further ordered that the remaining balance of the tender into the registry of this Court by Liverpool & London & Globe Insurance Company, Ltd., shall be paid to the United States of America.

The United States of America duly excepts to all action of the Court aforesaid.

WM. H. ATWELL,
U. S. Dist. Judge.

In the United States District Court for the Northern District of Texas, Dallas Division

No. 4715, Civil

SUNNYLAND WHOLESALE FURNITURE COMPANY

v.

THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, LTD.

54 THE UNITED STATES OF AMERICA INTERPLEADED DEFENDANT

SUIT OVER PRIORITY OF LIENS

James R. Alexander, for the Plaintiff, Thompson & Coe, for the Defendant, Wm. Cantrell, Jr., Assistant United States Attorney, for the United States, all of Dallas, Texas.

Opinion

October 7, 1952

The suit was instituted in the state court, where the United States, interpleaded, and then filed a petition for removal, which was granted. The removal was effected on June 23rd, 1952, and a number of dilatory motions have been filed and acted upon since then.

The action is a garnishment under the State of Texas statute, and the defendant insurance company tendered into the registry of the court on September 1st, 1952, $7,500.19.

The issue between the United States and the plaintiff arises out of an indebtedness by Adams and his wife, to the plaintiff, out of which the garnishment was served upon the petition of the plaintiff against the insurance company. The United States claims that it had a tax lien against debtor Adams before the plaintiff secured its garnishment lien. The facts disclose that the garnishment lien was first fixed and that the tax lien was subsequent to that fixing.

55 The garnishee requested a reasonable fee for filing pleadings and attending the ripening and tendering thereof and for the deposit of the money in the registry of the court.

The amount claimed by the government against Adams and his wife, and against Adams, himself, exceeds the amount deposited in court by the defendant insurance company.

The government contends that notwithstanding the fact that the garnishment lien attached prior to the time of the fixing of its lien under 53 Stat. 448, 26 U. S. C., Secs. 3670, 3671, and

3672, that it is entitled to the money on deposit and points to United States v. The Security Trust & Savings Bank, 340 U. S. 47.

The case is hardly an authority here. It relates to an attachment lien under the California Code. In that case the federal tax lien was recorded subsequent to the date of the attachment lien but before the attaching creditor obtained judgment. In that case, also, the state court, itself describes the lien as inchoate, and the Supreme court accepts that classification as practically conclusive. In that sort of a situation the attachment lien is contingent, and the United States tax lien is not defeated by a contingent, inchoate lien prior in time.

The government also cites United States v. Yates, 204
56 SW. 399, which is rather an authority for the plaintiff. Its citation, also, of United States v. Texas, 314 U. S. 480 gives us a case not in point.

It will be noticed that the United States statute mentioned above provides that, "This statutory lien shall not be valid against mortgages, *pledgees*, purchasers, or judgment creditors, until notice thereof has been filed in the office provided by the law of the state for such filing," and in this particular case no lien was filed in the County records of the State of Texas prior to the securing of the garnishment lien.

The spirit of this statutory provision vitalizes the thought that those who hold valid liens, such as are mentioned in the statute, are not affected by government liens subsequently acquired.

The ordinary rule with reference to the preference of government claims over private claims has no application here. This case is ruled by the securing of the first lien. The first lien is not crippled nor made subordinate by the acquisition of a subsequent lien by the national government.

See also United States v. Land, 73 F. (s) 820, and United States v. Waddill, Holland & Flinn, Inc., et al., 323 U. S. 353, where the reasoning of the court explains the validity, priority, and vitality of the lien family. Other cases that are helpful are Burger v. Wells, 110 Texas 566; Snyder Motor Company v. Universal Credit Corp., 199 SW (2) 792; State University v.
57 Hart, 210 La. 78, 174 A. L. R. 1366; Foecke et al. v. Blum, 17 SW. 770 (Tex. Sup. Ct.); Ash v. Aiken, 21 SW. 618; Holloway Seed Co. v. City National Bank of Dallas, 47 SW. 95 (Sup. Ct. of Texas); Jobber Distributing Co. v. Goldstein, 265 SW. 1085; Voelkl-McLain Co. v. First National Bank, 296 SW. 970; Globe & Rutkers Fire Ins. Co. v. Brown et al., 52 F. (2) 164; and Daniel v. East Texas Theaters, 127 SW. (2) 240.

Accordingly, judgment must go for the plaintiff and against the interpleading United States.

(S) WM. H. ATWELL,
United States District Judge.

Done at Dallas, Texas, on this the 7th day of October 1952.

In United States District Court

Notice of appeal

Filed October 20, 1952

Now comes the United States of America, Intervenor in the above numbered and entitled cause, by and through Frank B. Potter, United States Attorney for the Northern District of Texas, and hereby gives notice of appeal to the United States Court of Appeals for the Fifth Circuit from the final judgment entered by the Court herein on the 7th day of October 1952.

58 (S) Frank B. Potter,
FRANK B. POTTER,
United Staies Attorney.

[Motion for extension of time omitted in printing.]

59 [Order granting extension of time omitted in printing.]

60 In United States District Court

[Title omitted.]

61 Transcript of proceedings had on the trial of the above-entitled and numbered cause, at Dallas, Texas, on October 7, 1952, before the Hon. William H. Atwell, Judge.

Colloquy between Court and counsel

Judge ATWELL. Are the parties ready in this case?

Mr. ALEXANDER. The plaintiff is ready.

Mr. COE. We are ready except that there is an absent signed copy of a stipulation by which we had hoped to be dismissed. Our file reflects it was mailed to Mr. Cantrell September 18, but he does not seem to have it, but there is no disagreement between the parties.

Mr. CANTRELL. We are ready, Your Honor.

The COURT. Do you have witnesses you wish to be sworn?

Mr. CANTRELL. Yes, sir.

Mr. COE. In connection with our answer and garnishment and request for dismissal, we are asking for an attorney's fee, and if

Your Honor will care to hear the evidence on it, Mr. Will C. Thompson has done most of the work and he is here.

62 The COURT. I am not indicating what I want to hear and don't want to hear; if you have any witnesses have them sworn.

Mr. COE. In the event you do want to hear him he will be a witness.

(The witnesses were sworn.)

The COURT. Do you care to make a statement for the plaintiff?

Mr. ALEXANDER. Your Honor, in this case there is very little dispute of facts. The parties have agreed to all the facts and the situation is this: the plaintiff, the Sunnyland Wholesale Company, filed suit on sworn accounts and writ of garnishment, in the state district court, which was later removed to the federal court by the United States government. The government filed a tax lien on April 26. It is the contention of the plaintiff that our garnishment or lien is prior to the tax lien, and that is the contention before the court.

HARRY C. RUSSEY, being duly sworn and examined by Mr. Cantrell, testified as follows:

Q. Your full name, please?

A. Harry C. Russey.

Q. What is your occupation?

A. I work for the Internal Revenue Department, First Texas District at Austin.

Q. Do you have legal custody of the records of the collector of internal revenue of the First District?

A. I do.

63 Q. Have you examined the file of the records showing tax liability involved in this lawsuit?

A. Yes, sir.

Q. Do you have anything prepared from your records?

A. I had certified copies prepared of the assessment list and a certified copy of the notice and demand.

Q. With reference to the years 1948, 1949, and 1950, can you tell me what the dates of assessments were, assessments for income tax against the Adams, Adams and wife?

A. For the year 1948 there was assessed jointly against D. Ray Adams and Mary Adams an income tax in the amount of $1,594.14 and interest, which was assessed $295.70; that made a total of $1,889.84.

Q. What date was that assessment made by the commissioner?

A. The assessment was signed by the commissioner of internal revenue on April 18, 1952.

Q. What date was it received by the Collector of the First District of Texas?

A. It was received by the collector at Austin, the Collector for the First District of Texas, April 21, 1952.

Q. Has there been a credit allowed against that assessment?

64 A. The first notice was sent out to the tax payer on April 21, 1952. Thereafter, on September 5, 1952, there was allowed a credit for overpayment of the tax payer in 1951 income tax return, and the amount of the credit was $965.27. That changes the outstanding balance from $1,889.84 to $927.57.

Q. What is the amount now due?

A. There is an outstanding tax now due——

Q. (Interrupting.) Is there any interest?

A. There would be interest up to October 6 in the amount of $47.22, and that added to the outstanding tax makes a total of $971.79.

Q. With reference to the year 1949, how much taxes, interest and penalty was assessed?

A. There was assessed for the year 1949 against D. Ray Adams and Mary Adams a tax in the amount of $6,247.67, interest $784.04, penalty $373.70, or a total of $7,404.78, to which has been added accrued interest up to October. Accrued interest to October 6, 1952, is $206.96, and that makes a total of taxes, plus interest, that is assessment plus accrued interest, $7,611.74.

Q. With reference to 1952?

A. On this same list, these three years are all on the same list signed April 18, 1952, and received by the collector in Austin on April 21, 1952.

Q. For the year 1950 income tax?

A. 1950 income was assessed jointly against D. Ray Adams and Mary Adams in the amount of $1,054.21, and assessed interest of $69.04, or a total of $1,123.25.

65 Q. What additional interest was due October 6 of this year?

A. $31.39, making a total of $1,164.64.

Q. With reference to the year 1949, when was notice and demand made?

A. April 21, 1952.

Q. With reference to the year 1952, when were notices and demands made?

A. April 21, 1952.

Q. Do you have any other type of tax assessed against D. Ray Adams and his wife?

A. We have a withholding for two quarters.

Q. Let's take the first quarter, the quarter ending September 30, 1951, is that the quarter for which they are assessed?

A. The correction would be that the withholding is against D. Ray Adams, the first withholding for the quarter ended September 1951. The return was received in the office November 9, 1951, and the tax was in the amount of $1,511.56. There was a penalty for late filing of $75.57, and interest $1.21; that would be a total of $1,588.34.

The tax payer remitted a check in the amount of $1,511.56, which was the actual amount of tax, not including penalty and not including interest. That check was "N. S. F."

Q. What does that mean?

66 A. Not sufficient funds, what we call a hot check, and it came back to the collector on December 11, 1951, and was charged back to the account. And then the taxpayer on December 27, 1951, paid $76.78, which covers the penalty and the interest.

Q. But he did not pay the principal tax?

A. He did not pay the tax of $1,511.56.

Q. Was notice and demand thereafter sent to this tax payer?

A. Mailed to the tax payer—had been mailed on December 17 giving credit with the check of $1,511.56, so the notice was actually for $76.78.

Q. When was the assessment made?

A. December 18, 1951.

Q. When was it received by the collector at Austin, this check?

A. December 26, 1951.

Q. Was the notice and demand about which you testified only one notice that you sent out?

A. That is the only one I have any record of here. On the $1,511.56 tax I find an accrual of interest on October 6, 1951, in the amount of $82.27. Also there is a penalty of 5% which is assessed when tax is not paid within the ten days, and that penalty assessed was $75.58. It is not assessed but it is accrued, and the total is $1,669.41.

Q. Now taking the second period?

67 A. The second period is for the quarter ended December 31, 1951, and there is assessed against D. Ray Adams, and the amount of the taxes, $1,303.15, interest $6.50. With the return there was received a payment of $303.15, and the date of that payment was January 31. It was timely filed and there is a credit of $303.15, leaving a balance of $1,006.50.

Now we have accrued interest on that up to October 6, 1952, of $36.71, and we have a 5% penalty for failure to pay tax within ten days after the notice, and that penalty is $50.33, and that makes a total of taxes accrued, interest and penalty, of $1,093.54.

Q. Were there any levies and notice of lien, or both, filed in this case?

A. Our first notice of tax lien was filed on March 25, 1952, in Bell County, at Belton, Texas. It includes the two items, the withholding for the quarter for the period ended 9-30-51, and includes the quarter for the period ended 12-30-51, and a small item of miscellaneous taxes which has been paid since, $1.99.

The next tax lien was filed April 26, 1952, in Bell County at Belton, Texas, and covers the three items of income taxes for the years 1948, 1949, and 1950. These are the original amounts.

Q. Filed when?

A. April 26, 1952. The lien was for $10,417.87. It shows the full amount of 1948 which has since been reduced by the credit that I gave.

The COURT. Reduced by what credit?

68 The WITNESS. By a credit of $965.27 dated September 5, 1952.

Mr. CANTRELL. Q. Was that credit an overpayment on 1951 taxes?

A. Yes, sir. A levy was filed with the representative of the insurers.

Q. What insurers?

A. That says Hartford Fire Insurance Company. That levy was dated April 7, 1952, and was served at 2:20 p. m. on April 7, 1952, by William A. Freeman, deputy collector at Temple. That agency is also at Temple, and that levy was in the amount of $2,784.56.

Q. Any other levy?

A. In addition to that levy being filed there was also served on the insurance agent a copy of the warrant attached and a copy of the tax lien, which was filed on March 25.

The next levy was served on April 30, 1952, in the amount of $10,469.96. There is a certification on the back of the levy made by the deputy collector stating that: "I have this day, on the 30th day of April, delivered a copy of this levy to * * *, the agent of the Hartford Fire Insurance Company and Liverpool, London & Globe Insurance Company, Ltd., at Temple, Texas." With that letter was served copies of the lien which has been filed—notice of the lien, which has been filed on April 25, and warrants for restraining in the amount of $10,469.96 which includes tax, plus interest and penalty.

69 Q. Are those all of the levies?

A. That is the two levies and two liens and all of these taxes.

Q. Did you compute the total figure which is due by D. Ray Adams and his wife as of the sixth day of October, 1952, due to the United States?

A. I will have to add the item of income to the item——

Q. (Interrupting.) Add it right quick, please, sir. Let's have it in the record.

A. The total is $4,501.11.

The Court. You said the total owing by Adams and wife?

The Witness. I added separately and now I can give you the separate figures——

Mr. Cantrell. (Interrupting.) Go ahead and do that.

A. Income taxes of Adams and wife plus interest and all, totals $9,738.17. The two items of withholding tax against D. Ray Adams totaled $2,762.94.

Mr. Cantrell. I pass you the witness.

Cross-examination by Mr. Alexander:

Q. State if there were any other credits due the government on these taxes.

A. On these assessed items there are no other credits, no, sir.

70 Q. You said there had been certain levy served on the Hartford Insurance Company, has any money been collected from them?

A. I have no knowledge of any money being collected from the insurance company.

The Court. This one that you did serve, you said he was the agent for the Hartford and Liverpool and London Company?

A. That was indicated by the deposition.

Q. That means both times?

A. No, sir; the first time we served the first levy on April 7, I delivered a copy of this letter to the Hartford Fire Insurance Company's agent. On the second letter he shows the two companies.

The Court. That is what I was asking you, I just wanted to get that straight, you don't know whether he represented one of the companies at the same time or not?

A. I don't know.

Mr. Alexander. Q. Do you know anything about the status of the claims of the bureau against the Hartford Insurance Company other than what you have testified to?

The Court. There is nothing against the Hartford here, he did not testify to any against the Hartford.

71 Mr. Alexander. They served the Hartford, possibly the government has ben paid some money from the Hartford.

A. No, sir; that case has not come up.

(Witness excused.)

The Court. The plaintiff rests, does it?

Mr. Cantrell. Yes, sir.

Mr. ALEXANDER. We have a stipulation of facts which the parties have agreed to, and which has been marked Defendant's Exhibit No. 1.

We also have Defendant's Exhibit No. 2, a copy of a recorded abstract of judgment.

We offer in evidence both of these exhibits, one and two.

(Photostats of these exhibits are to be made and placed in the record, to which reference is here made, and same are made a part of this record.)

The COURT. Some gentleman was in here wanting a fee.

Mr. CANTRELL. On the part of the United States I cannot have any agreement on that question. I cannot agree to a fee; we wouldn't have any right to agree.

Mr. ALEXANDER. I have no objection.

Mr. COE. We asked for a fee of $500 in connection with several answers that have been filed in preparation for trial, etc.

72 The COURT. That looks like a reasonable fee, gentlemen.

Mr. COE. I would like to have the rest of the day to file that stipulation when we locate it, so it will be in here, a stipulation as to the amout of money which is tendered.

The COURT. The amount is shown here, $7,500.39.

Mr. COE. Yes, sir.

The COURT. The pleadings show that, don't they?

Mr. COE. $7,500.39 we agree is the correct amount.

The COURT. Both sides rests. Do you want to argue the case, gentlemen?

Mr. CANTRELL. I won't need over two minutes.

The COURT. About how long do you think you want to argue?

Mr. ALEXANDER. I think about five minutes.

The COURT. I'll give you fifteen minutes on a side, is that satisfactory?

Mr. CANTRELL. Yes, sir. I don't need that much.

The COURT. All right, go ahead.

(A brief argument was made by each side but said argument was not reported by the reporter.)

73 *Opinion of the Court*

Judge ATWELL. This case was removed to this court on June 23 by the United States, since which time a number of motions have been argued and presented by the interpleading insurance companies, and I think for the services of the insurance company in the filing of the case in the state court and the work done in this court, the different arguments and proceedings, that a fee of $500 is a very reasonable fee for that service as an interpleader.

As to the contract between the plaintiff and the United States I find that the plaintiff has a superior lien under the laws of the

state of Texas prior to the filing of the government's lien for taxes that have been proven here against Adams and his wife as well as against Adams individually, and that the plaintiff's lien was fixed prior to the fixing of the lien by the United States, and therefore the fund must go to the plaintiff and no part of it to the United States.

I'll ask you to prepare the judgment, please. Do you wish to except?

Mr. CANTRELL. Yes, Your Honor, I wish to except.

Mr. COE. I was wondering if a separate order dismissing the garnishee would be in order since there may be an appeal. I do not know whether the Court would want me to submit a separate order which I have prepared or not, or would you prefer it be done in one order?

The COURT. One order, of course.

74 If there are no other orders, gentlemen, we will adjourn until tomorrow morning at ten o'clock.

Reporter's Certificate

I hereby certify that the above and foregoing 17 pages constitute a true and correct transcript of the proceedings had on the trial of the case, the style of which is set forth on page one of this transcript, with the exception of the exhibits introduced, which are herein referred to and which are to be photostated and placed with the record, and also excluding the argument of counsel, which was not reported.

Given under my hand this 8th day of January 1953.

J. A. REAGIN,
Acting Official Reporter.

In United States District Court

Defendant's exhibit 1

STIPULATION

The plaintiff, Sunnyland Wholesale Furniture Company, the intervenor, United States of America, D. Ray Adams and wife, Mary Martha Adams defendants and the Liverpool & London & Globe Insurance Company, Ltd., garnishee and defendant hereby stipulate as follows:

75 I

That the plaintiff Sunnyland Wholesale Furniture Company did on the 8th day of April 1952, file a certain lawsuit and writ of garnishment, the lawsuit being No. 64579–G in the 134th Judi-

cial District Court of Dallas County, Texas, the defendant in said case being D. Ray Adams dba Adams Furniture and Hardware Company and as Temple Gas Equipment Company and the garnishment suit being known as No. 64586-G in the 134th Judicial District Court of Dallas County, Texas, and being styled Sunnyland Wholesale Furniture Company, a corporation, plaintiff vs Liverpool & London & Globe Insurance Company, Ltd., garnishee.

II

Service of the writ of garnishment was made upon a duly authorized officer of the Liverpool & London & Globe Insurance Company, Ltd., garnishee on the 9th day of April, 1952.

(S) JAMES R. ALEXANDER,
Sunnyland Wholesale Furniture Co.,
Plaintiff.

(S) WILLIAM CANTRELL, JR.,
Assistant U. S. Attorney,
United States of America.

76

(Not signed)
D. RAY ADAMS,
(Not signed)
MARY *MARTHR* ADAMS,
VERNON COE,
The Liverpool & London & Globe
Insurance Company, Ltd.

In United States District Court

Defendant's Exhibit 2

ABSTRACT OF JUDGMENT

THE STATE OF TEXAS,
County of Dallas:

I, Bill Shaw, Clerk of the District Court of Dallas County, Texas, do hereby certify that in the District Court of the 134th Judicial District of Texas, in a certain suit pending in said Court, wherein Sunnyland Wholesale Furniture Company, a corporation, is plaintiff, and D. Ray Adams, dba Adams Furniture & Hardware Company, and as Temple Gas Equipment Company, is defendant, No. 64579-G. The said plaintiff Sunnyland Wholesale Furniture Company, a Texas Corporation recovered a judgment against said defendant D. Ray Adams, dba Adams Furniture & Hardware Co. and as Temple Gas Equipment Company, on the

20th day of June, 1952 for the sum of Twenty-Five Hundred Sixteen and 07/100 ($2,516.07) Dollars, with interest on said
77 amount from the 20th day of June, 1952, at the rate of six per cent, per annum, and $18.45, cost of suit. Said judgment is of record in Vol. B, Page 177, Records of said Court. Said judgment is entitled to following credits, to wit: none shown.

There is now still due on said judgment $2,516.07, with interest on $2,516.07 from the 20 day of June, 1952, at the rate of six per cent per annum and $18.45 costs of suit.

Given under my hand and seal of office, at Dallas, this 20 day of June 1952.

Attest:

BILL SHAW,
Clerk District Courts, Dallas County Texas.
By (S) TROY E. HILL,
Deputy.

THE STATE OF TEXAS,
County of Bell:

I, Mrs. Ruby McKee, County Clerk of Bell County, Texas, do hereby certify that this Abstract of Judgment was filed for record in my office on the 24 day of June A. D., 1952, at 8 o'clock a. m., and was immediately recorded in book 10, page 219 Record of Abstract of Judgments of Bell County, Texas, on the 24th day of June A. D., 1952, at 3:45 o'clock p. m., and was also at the same entered upon the index to said Judgment Record,
78 showing the names of each Plaintiff and each Defendant in said Judgment, and the number of the pages of the book upon which said abstract is recorded.

Witness my hand and seal of office this 24th day of June A. D. 1952.

MRS. RUBY MCKEE,
County Clerk, Bell County, Texas.
By M. BRYAN,
Deputy.

No. 64579-G

In the District Court 134th Judicial District of Texas

SUNNYLAND WHOLESALE FURNITURE COMPANY

v.

D. RAY ADAMS, D/B/A

ABSTRACT OF JUDGMENT

Issued this 20th day of June A. D. 1952.

BILL SHAW,
Clerk District Courts, Dallas County, Texas.
79 By TROY E. HILL,
Deputy.

Filed for record this 24th day of June 1952 at 8:00 a. m.

RUBY MCKEE,
Clerk County Court, Bell County, Texas.

FRITZ, GOLDBERG & ALEXANDER,
201 Reserve Loan Life Bldg., Dallas, Texas.

[Designating of record omitted in printing.]
82 [Clerk's certificate to foregoing transcript omitted in printing.]

That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 3, 1953

No. 14404

UNITED STATES OF AMERICA, INTERVENOR,

versus

THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, LTD., AND SUNNYLAND WHOLESALE FURNITURE COMPANY

On this day this cause was called, and after argument by Miss Louise Foster, Special Assistant to the Attorney General, for appellant, and James R. Alexander, Esq., and R. B. Cousins, III, Esq., for appellees, was submitted to the Court.

OPINION OF THE COURT—Filed December 22, 1953

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14404

UNITED STATES OF AMERICA, INTERVENOR, APPELLANT,

versus

THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, LTD., AND SUNNYLAND WHOLESALE FURNITURE COMPANY, APPELLEES

Appeal from the United States District Court for the Northern District of Texas

[December 22, 1953]

Before HUTCHESON, *Chief Judge*, and BORAH, and RIVES, *Circuit Judges*

BORAH, *Circuit Judge:*

This is an appeal from a final judgment of the United States District Court for the Northern District of Texas holding that the appellee Sunnyland Wholesale Furniture Company had a garnishment lien upon funds of D. Ray Adams and his wife which was

superior to a federal income tax lien claimed by the United States of America, appellant.

The undisputed facts are these. In the month of December, 1951, assessments were executed by the Commissioner of Internal Revenue covering withholding taxes and interests thereon which were assessed against D. Ray Adams, d/b/a Adams Furniture & Hardware Company, for the year 1951. The assessment lists were received on December 26, 1951, and February 26, 1952, respectively, by the Acting Collector of Internal Revenue for the First Collection District of Texas and on March 24, 1952, he filed a notice of tax lien in the office of the County Clerk of Bell County, Texas, in favor of the United States in the sum of $2,520.05.

On March 8, 1952, fire destroyed certain stock, furniture, and fixtures of the Adams Company in Bell County which was the community property of D. Ray Adams and Mary Martha Adams, his wife. The loss was covered by fire insurance policies in force with appellee Liverpool & London & Globe Insurance Company, Ltd., and another insurer not here involved. Adjusters for the insurance companies determined the extent of the loss to be $15,153.06, and an agreement was entered into between Adams and his wife and the insurance companies to settle for that amount, each company agreeing to share one-half of the liability or $7,576.53. On April 7, 1952, the Acting Collector issued warrants of distraint and served on insurer's local agent a notice of levy in the amount of $2,784.56, together with copies of the warrants of distraint and notice of tax lien.

On April 8, 1952, and prior to the payment of the insurance proceeds to any party the appellee furniture company filed suit on sworn accounts against Adams in the District Court of Dallas County, Texas, to obtain a judgment in the amount of $2,329.27. At the same time a garnishment suit was brought against the appellee insurance company to establish and enforce its garnishment lien in the sum of $2,329.27 with interest and costs against the funds held by its local agent. A writ of garnishment issued and on the following day it was served on the agent, attaching these funds.

On April 18, 1952, during the pendency of the state court proceedings, additional assessments were executed by the Commissioner of Internal Revenue covering income taxes and interests thereon which were assessed against Adams and his wife for the years 1948 to 1950, inclusive. The assessment list was received on April 21, 1952, by the Acting Collector and on April 26, 1952, he filed a notice of tax lien in the office of the County Clerk of Bell County in favor of the United States in the sum of $10,417.57 plus interest. Thereafter, the Acting Collector served on the insurer's local agent a copy of the notice of tax lien together with warrants of distraint and notice of levy in the amount of $10,469.9

This suit is an outgrowth of the state court garnishment proceeding which was instituted by appellee Sunnyland Wholesale Furniture Company. By an amendment to its answer therein the appellee insurance company named the United States as an additional party defendant on the grounds, among others: (1) that it had been served with the aforementioned notices of levy and warrants of distraint notifying garnishee that all property, rights to property, monies, credits and/or bank deposits in appellee's possession and belonging or owing to D. Ray Adams, Adams Furniture & Hardware Company, and Mary Martha Adams were seized and levied upon for the payment of the tax liens in the amounts of $2,784.56 and $10,469.96; (2) that demand was made upon the appellee insurer for these sums or for such lesser sum as it may owe to the tax debtors; and (3) that the garnishee did not know and was unable to learn what the attitude of the United States, the Acting Collector of Internal Revenue or the plaintiff in the garnishment proceeding would be relative to the matter of priorities as between them. The relief asked was that citation issue against the United States and the Acting Collector requiring them to answer and appear and set up their claims for lien or such other claims as they or either of them assert in connection with either of the levies above mentioned; that the garnishee be protected against liability in excess of its liability to the assured; and that it be granted a reasonable attorney's fee. This amendment was allowed and process was issued commanding the impleaded defendant, the United States of America, to appear in the state court. The suit was thereafter removed to the United States District Court for the Northern District of Texas on petition of the United States. Subsequently, and upon the ground that it had not consented to be made a party defendant the Government moved that the action against it be dismissed and that it be allowed to intervene as a party plaintiff for the purpose of seeking foreclosure of its lien. This motion was granted and the United States filed its petition in intervention naming Adams and his wife and the two appellees herein as defendants and claiming first and prior tax liens under Section 3670, et seq. of Title 26, U. S. C., on any and all property and rights to property belonging to the taxpayers. The appellee insurance company filed responsive pleadings in which it tendered its loss draft in the sum of $7,500.39 into the registry of the court and prayed for an order directing the clerk to receive and collect this draft and place the proceeds in the registry of the court and that Adams and his wife, the United States, and the appellee furniture company be required to interplead setting up the rights of each of them in and to the fund. It further prayed for a discharge from any other or further liability and for a reasonable attorney's fee in the sum of $500.00. Thereafter and on motion of the insurer the court entered an order directing the clerk to receive and collect the draft and

place the proceeds thereof in the court's registry subject to the further order of the court. After the pleadings were closed a trial was had on the merits upon the pleadings, evidence and an agreed written stipulation of facts.

The District Court made fact findings and concluded as a matter of law that the appellee furniture company had a fixed lien by virtue of the execution of its writ of garnishment which was prior in point of time and superior to the Federal income tax lien claimed by the United States. The court was further of opinion that there was no contest between the appellee insurance company and any other parties to the cause and concluded that the insurer was entitled to a reasonable attorney's fee. Judgment was accordingly entered in favor of the appellee furniture company and against the United States for the specified amount due on its lien and it was ordered that the insurance company be allowed a $500.00 attorney's fee and that the remaining balance of the tender into the registry of the court by the appellee insurer be paid to the United States. From this judgment the United States has appealed and the defendant garnishee below, Liverpool & London & Globe Insurance Company, Ltd., and the plaintiff, Sunnyland Wholesale Furniture Company, are appellees herein.

The tax liens asserted by the United States stem from 53 Stat. 448, 449, 26 U.S.C. (1946 ed.) § 3670, 3671, 3672. Section 3670 provides:

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." Section 3671 provides that unless some other date is specified by law the lien arises when the assessment lists are received by the collector, which effective dates are December 26, 1951, and February 26, 1952, as to the withholding tax liens and April 21, 1952, as to the income tax lien. Section 3672 provides that the lien shall not be valid against mortgagees, pledgees, purchasers or judgment creditors, until notice thereof has been filed in the office provided by the law of the state for such filing—in this case, the office of the County Clerk of Bell County. The appellee furniture company does not claim to be within the classes of persons specified in § 3672, and, accordingly, that section is not material to our present inquiry. Furthermore, it was conceded during oral argument that the withholding tax liens are prior in time to the garnishment lien and it follows that the United States is entitled to a priority in payment of $2,578.55 out of the funds on deposit in the registry of the District Court. The important question here is whether at the time the Government's income tax lien arose appellee's garnishment lien possessed "the

characteristics of a specific perfected lien which alone bars the priority of the United States." See *United States v. Knott*, 298 U. S. 544, 56 S. Ct. 902, 905. The issue thus concerns the effect of a lien in relation to a provision of federal law for the collection of debts owing the United States, which has always been considered a federal question. Hence the Supreme Court has consistently held that while a state court's characterization of a lien as specific and perfected is entitled to weight, it is subject to re-examination by the federal courts. On the other hand, if the state court itself describes the lien as inchoate, this classification is "practically conclusive." *Illinois v. Campbell*, 329 U. S. 362, 371.

In this case the United States first argues that under the law of Texas the lien of the appellee furniture company was inchoate and that therefore we may reverse the judgment on this basis. More specifically it argues that in Texas a garnishing creditor's rights in the property are purely potential and contingent until judgment is entered establishing the garnishment lien. We do not at all agree.

Under the law of Texas, as expressed by statute [1] and the deci-

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[1] Art. 300, Vernon's Ann. Civ. St., provides:

"Attachment creates a lien

"The execution of the writ of attachment upon any property of the defendant subject thereto, unless the writ should be quashed or otherwise vacated, shall create a lien from the date of such levy on the real estate levied on and on such personal property as remains in the hands of the attaching officer, and on the proceeds of such personal property as may have been sold."

Art. 301, Vernon's Ann. Civ. St., provides in part:

"Judgment and foreclosure

"Should the plaintiff recover in the suit, such attachment lien shall be foreclosed as in case of other liens, and the court shall direct the proceeds of the personal property sold to be applied to the satisfaction of the judgment, and the sale of personal property remaining in the hands of the officer and of the real estate levied on, to satisfy the judgment * * *."

Art. 4076, Vernon's Ann. Civ. St., provides in part:

"Who may issue and when

"The clerks of the district and county courts and justices of the peace may issue writs of garnishment, returnable to their respective courts, in the following cases:

* * * *

"2. Where the plaintiff sues for a debt and makes affidavit that such debt is just, due and unpaid, and that the defendant

sions of its highest court, a garnishment is virtually a process of attachment and the service or levy of the writ of garnishment or attachment upon personal property creates a lien from the date of the levy, giving to the creditor a paramount right to such property itself as a security for the satisfaction of his demand. *Focke v. Blum*, 17 S. W. 770; *Buerger v. Wells*, 222 S. W. 151; *Kanaman v. Hubbard*, 110 Tex. 560, 22 S. W. 151; *United States v. Yates*, Tex. Civ. App., 204 S. W. 2d 399, writ refused. See also, *in Re Jones*, D. C., 42 F. 2d 269; Vol. 27, Texas Jur., Sec. 37, page 500, where the rule is announced as follows: "The levy under a valid writ of attachment or execution places the property levied on within the custody of the law. It has, generally speaking, the effect of segregating that portion of the debtor's property which is necessary to satisfy a money judgment against him." The United States does not claim that the appellee failed to take any step to validate its writ of garnishment in conformity with the laws of Texas. In *United States v. Yates, supra*, it was held that an attachment lien filed accordingly to law was specific, perfected and fixed upon the date of its levy and took priority, as of the date the writ was served, over a lien filed by the government for withholding and social security taxes filed subsequently thereto, but before the judgment of the court established and foreclosed the attachment lien. We think this decision correctly sets forth the law of Texas, regardless of what might be the law in other jurisdictions. The authorities cited by the government are clearly distinguishable on their facts and do not at all support its contention that in Texas, a garnishing creditor's rights in the property at the time of garnishment are "purely potential and contingent." On this phase of the question the appellee furniture company must prevail.

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has not within his knowledge property in his possession within this State, subject to execution, sufficient to satisfy such debt; and that the garnishment applied for is not sued out to injure either the defendant or the garnishee. * * *"

"Art. 4084, Vernon's Ann. Civ. St., provides in part:

"Effect of service of writ

"From and after the service of such writ of garnishment, it shall not be lawful for the garnishee to pay to the defendant any debt or to deliver to him any effects; nor shall the garnishee, if an incorporated or joint stock company in which the defendant is alleged to be the owner of shares or to have an interest, permit or recognize any sale or transfer of such shares or interest; and any such payment or delivery, sale or transfer shall be void and of no effect as to so much of said debt, effect shares, or interest as may be necessary to satisfy the plaintiff's demand. * * *"

This brings us to the second phase of the main controversy, whether the liens were specific and perfected under federal law. In the most recent Supreme Court case, *United States v. Gilbert Associates*, 345 U. S. 361, the lien held by the Government under 26 U.S.C. (1946 ed.) § 3670 and an unperfected municipal tax lien which arose prior thereto were held to be "general" liens. In this situation and confronted with a lien of the same class the United States successfully claimed the benefit of another statute to give it priority, § 3466 of the Revised Statutes, 31 U.S.C. (1946 ed.) § 191, which provides: "Whenever any person indebted to the United States is insolvent * * *, the debts due to the United States shall be first satisfied; * * *." But here the United States made no contention, so far as the record shows, that the tax debtors were insolvent and is content to refer to § 3466 as a "kindred matter." See *United States v. Security Tr. & Sav. Bank*, 340 U. S. 47.

We do not at all agree with the Government that the Security Bank case is an authority here. The question there presented was whether a federal tax lien was prior in right to an attachment lien on property in California obtained under the California Code of Civil Procedure, where the attaching creditor had "merely a *lis pendens* notice that a right to perfect a lien exists" at the time when the tax liens of the United States were recorded. In that case the state court itself described the lien as inchoate and the Supreme Court accepted this classification as practically conclusive. In that sort of a situation the attachment lien is contingent, and the federal tax lien is not defeated by a contingent, inchoate lien prior in time. In the instant case a different situation is presented in that the Government here claims that its general tax lien is entitled to priority over the garnishment lien which was specific and perfected under Texas law before the second federal lien arose. If then the Security Bank case is not an authority here we think there is ample support for the District Court's holding that "this case is ruled by the securing of the first lien". The following are but some of the many cases which recognize the universal principle of first in time, prior in right. *Rankin v. Scott*, 12 Wheat. 177, 179, 6 L. Ed. 592; *Howard v. Railway Co.*, 101 U. S. 837, 25 L. Ed. 1081; *United States v. City of Greenville*, 4 Cir., 118 F. 2d 963.

In *Illinois v. Campbell*, *supra*, the Supreme court reviewed a number of its prior decisions under § 3466 and held that under the long-established rule there were three essentials which were crucial to determine whether the lien was specific and perfected, and these are "(1) the identity of the lienor, * * * (2) the amount of the lien, * * * and (3) the propert yto which it attaches * * *." It was held that the lien was not specific as to the property at the crucial time because it has not been definitely ascertained what property of the debtor was devoted to and used in his business and

such property had not severed itself from the general and free assets of the owner, from which the claims of the United States were entitled to priority. We think the present case comes within the established rule. Here, the identity of the lienor was made certain, before the Government's priority attached, by the filing of the garnishment proceeding on sworn accounts which fixed the amount of the lien. Here, there was never any question but that the property involved was definite and certain and it is clear that the levy under the writ of garnishment segregated a definite portion of the property from the debtor's general estate. We therefore feel justified in acting on the assumption that the Supreme Court would hold that the priority set up in § 3466 supra, would not divest a specific and perfected garnishment lien, attached to specific property which indeed was in *custodia legis* when the federal lien arose. In a closely analagous case and in not dissimiiar language we recently had occasion to discuss these selfsame principles and we adhere to the views therein expressed. *United States v. Albert Holman Lumber Co.*, 5 Cir., 206 F. 2d 685, Rehearing denied—F. 2d—.

The only remaining issue is whether the District Court erred in allowing an attorney's fee to the appellee insurance company. As to this little need be said, except that the allowance was authorized by the express terms of the applicable statute, Rule 677, Vernon's Texas Rules of Civil Procedure (formerly Art. 4100, Vernon's Ann. Civ. St.), and the authorities thereunder. *Rosenthal v. Frankfort Distillers Corp.*, 5 Cir., 193 F. 2d 137; *Sorenson v. City National Bank*, 121 Tex. 478, 479, 49 S. W. 2d 718; cf. 25 Tex. Jur., Sec. 11, page 62.

The judgment was right. It is

Affirmed.

RIVES, *Circuit Judge*, dissenting:

On April 21, 1952, the assessment list as to the income tax lien here in controversy was received by the collector, and, thereupon, under the terms of the statute, 26 U.S.C.A. 3670, 3671, a lien arose "in favor of the United States upon all property and rights to property * * * belonging to" the taxpayer. On April 26, 1952, notice of the lien was duly filed by the collector, and, thereupon, the lien became valid "as against any mortgagee, pledgee, purchaser, or judgment creditor", 26 U.S.C.A. 3672(a). On the latter date, the appellee furniture company had not secured a judgment against the taxpayer. Its writ of garnishment attaching the funds in aid of its pending suit had, however, been served on the insurer's agent on April 9, 1952 before the income tax lien arose. The question then is whether in the interim period between the service of the writ of garnishment and the securing of judgment, the funds "belonged to" the taxpayer.

The garnishing creditor bore the burden of securing a judgment without which the lien of its garnishment would amount to nothing. No presumption can be indulged that a judgment would be secured. If anything, the presumption is to the contrary. It has been expressly ruled that the doctrine of relation back of the judgment has no application against the Government. *United States v. Security Trust & Savings Bank*, 340 U. S. 47, 50. The funds "belonged to" the taxpayer until they had been taken from him by due process of law, and that means until he had had his day in court and a judgment rendered against him. Before that occurred, the income tax lien had arisen and had become valid even as against a judgment creditor.

It is important to note the specific statute with which we are concerned, namely the statute giving the United States a lien for its taxes, 26 U.S.C.A. 3670, and not the statute giving the United States priority as to all debts against insolvent debtors, 31 U.S.C.A. 191. The latter statute was the one involved in *United States v. Knott*, 298 U.S. 544, and *Illinois v. Campbell*, 329 U.S. 362, and the one considered in determining priorities of liens in *United States v. Gilbert Associates*, 345 U.S. 361, 365, 366. Even as to the general priority statute, the Supreme Court has been careful to point out that it has never actually decided whether the priority is overcome by a fully perfected and specific lien. *Illinois v. Campbell*, *supra*, at p. 370; *United States v. Gilbert Associates*, *supra*, at p. 365.

True, in the case last cited, the Court said that the United States was "a general lienholder on all the taxpayer's property", referring to 26 U.S.C.A. 3670. I agree, however, with what Judge Parker said in *United States v. City of Greenville*, 4th Cir., 118 F. 2d 963, 965:

> "To say that the lien provided by this statute is a general lien on all the property of the taxpayer does not help in the solution of the problem presented; for a lien is not deprived of validity because it attaches to a number of pieces, of property instead of to a single piece, nor is it for that reason to be subordinated to a junior lien attaching to a single piece of property.
>
> * * * * * *
>
> "After the lien provided by the statute attaches, the property has in a sense two owners, the taxpayer and, to the extent of the lien, the United States. * * *"

Like observations to those last expressed by Judge Parker do not hold true as to the furniture company's garnishment lien. The mere service of the writ of garnishment did not divest the taxpayer's title. Thereafter and before judgment rendered the property did not have in any sense two owners, the taxpayer, and(to the extent

of the lien of the garnishment, the furniture company. The taxpayer continued the sole owner until the lien of the United States fastened, and even thereafter, insofar as concerns the furniture company, until it secured a judgment against him.

Again reverting to the general priority statute, 31 U.S.C.A. 191, the Supreme Court has recently said:

> "In claims of this type, 'specificity' requires that the lien be attached to certain property by reducing it to possession, on the theory that the United States has no claim against property no longer in the possession of the debtor. Thelusson v. Smith, 2 Wheat. 396. Until such possession, it remains a general lien." *United States v. Gilbert Associates, supra*, at p. 366.

The service of the writ of garnishment effected no actual change in the possession of the property. The only way in which it can be claimed to have effected even a theoretical change of possession is that it may be said to have placed the property within the custody of the law, or to have the effect of segregating that portion of the taxpayer's property which might be necessary to satisfy a future judgment against him. That is not enough. Who would share in the property would not be known until the judgment was rendered. What was said in *United States v. Knott*, 298 U.S. 544, 550, is applicable here:

> "Obviously, the deposit did not divest the company's title to the securities. No one was appointed trustee; and, at the time of the deposit, there was no ascertainable beneficiary. Who would share in the proceeds of the securities could not be known until they were exhausted in satisfaction of judgments, or until the entry of the decree of distribution in a suit authorized by the 1933 amendment. While in the case at bar the Supreme Court declared that the deposit created a 'trust fund', the term appears to have been used to connote an inchoate general lien for the benefit of those persons who may become entitled to be paid from the proceeds, either as unsatisfied judgment creditors, or as Florida creditors at the time when insolvency supervenes. Such an interest lacks the characteristics of a specific perfected lien which alone bars the priority of the United States."

Also pertinent is *Illinois v. Campbell*, 329 U.S. 362, 376, where the Court said:

> "The state has acquired neither title nor possession, Thelusson v. Smith, 2 Wheat. 396; New York v. Maclay, 288 U. S. 290, since the receiver's possession was that of the court, not of the state, and did not sever the property from the debtor's general assets as of the crucial date."

If reality rather than terminology is to be the guide, the lien of this garnishment was no more specific and perfected than was the lien of the attachment in *United States v. Security Trust & Savings Bank*, 340 U.S. 47. The decision of this case seems to me contrary to the decision in that case.

As to the five hundred dollars attorney's fee allowed by the district court to the insurance company for interpleading the parties, it seems even clearer to me that that portion of the fund belonged to the taxpayer at the time the lien of the United States arose, and that the attorney's fee could not be allowed out of the funds available for the payment of the tax lien of the United States.

I, therefore, respectfully dissent.

JUDGMENT

Extract from the Minutes of December 22, 1953

No. 14404

UNITED STATES OF AMERICA, INTERVENOR,

versus

THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, LTD., AND SUNNYLAND WHOLESALE FURNITURE COMPANY

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Rives, Circuit Judge, dissents."

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 83 to 101, next preceding this certificate, contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered, 14404, wherein United States of America, Intervenor, is appellant, and the Liverpool & London & Globe Insurance Company, Ltd., and Sunnyland Wholesale Furniture Company are appellees, as full, true and complete as the originals of the same now remain in my office.

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I further certify that the pages of the printed record, numbered from 1 to 82 are identical with the printed record upon which said cause was heard and decided in the said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 13th day of February, A.D., 1954.

(S.) OAKLEY F. DODD,
Clerk, United States Court of Appeals
for the Fifth Circuit.

[SEAL.]

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95 Supreme Court of the United States

No. 642, October Term, 1953

[Title omitted.]

Order allowing certiorari

Filed May 24, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE 1954